

KENNETH B. WILSON, State Bar No. 130009
kwilson@perkinscoie.com
STEFANI E. SHANBERG, State Bar No. 206717
sshanberg@perkinscoie.com
ESHA BANDYOPADHYAY, State Bar No. 212249
ebandyopadhyay@perkinscoie.com
SARAH E. PIEPMEIER, State Bar No. 227094
spiepmeier@perkinscoie.com
PERKINS COIE LLP
180 Townsend Street, Third Floor
San Francisco, California 94107-1909
Telephone: (415) 344-7000
Facsimile: (415) 344-7050

Attorneys for Plaintiff CHIP-MENDER, INC.
and Counterclaim-Defendants CHIP-MENDER, INC.
and TIMOTHY M. RUSSO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHIP-MENDER, INC.,
a California corporation,

Plaintiff,

v.

SHERWIN-WILLIAMS COMPANY,
a Delaware corporation,

Defendant.

CASE NO. 05-CV-3465 (MEJ)

**NOTICE OF MOTION AND MOTION TO
DISMISS OR, IN THE ALTERNATIVE, TO
BIFURCATE AND STAY
COUNTERCLAIMS**

Date: December 1, 2005

Time: 10:00 a.m.

Before: Honorable Magistrate Judge James

Location: Courtroom B, 15th Floor

AND RELATED COUNTERCLAIMS

TO DEFENDANT AND COUNTERCLAIM-PLAINTIFF AND ITS ATTORNEYS OF
RECORD:

PLEASE TAKE NOTICE that pursuant to Federal Rule of Civil Procedure 12(b)(6),
plaintiff and counterclaim-defendant Chip-Mender, Inc. ("Chip-Mender") and counterclaim-
defendant Timothy M. Russo ("Russo") will move, and hereby do move, to dismiss with prejudice

defendant and counterclaim-plaintiff The Sherwin-Williams Company's ("Sherwin-Williams") counterclaims for (1) Sherman Act § 2 *Walker Process Fraud*; (2) Sherman Act § 2 Bad Faith Litigation; (3) Unfair Competition under Cal. Bus. & Prof. Code § 17200; (4) False or Misleading Statements under Cal. Bus. & Prof. Code § 17500; and (5) Deceptive Trade Practices pursuant to Ohio Revised Code § 4165 *et seq.* brought against Chip-Mender and Russo ("Counterclaims"). This motion is made on the grounds that the Counterclaims fail to state a claim upon which relief may be granted, and that they cannot be amended to state a claim.

PLEASE TAKE FURTHER NOTICE that pursuant to Federal Rules of Civil Procedure 42(b) and 26(d), Chip-Mender and Russo will further move, and hereby do move, in the alternative, for an Order bifurcating and staying Sherwin-Williams' Counterclaims pending the resolution of Chip-Mender's claims against Sherwin-Williams. This motion is made on the grounds that bifurcating the Counterclaims from the issues of patent infringement will assist in avoiding prejudice and be conducive to expedition and economy.

The motion shall be heard on December 1, 2005, at 10:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Magistrate Judge James in Courtroom B, 15th Floor of the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Ave., San Francisco, California.

Chip-Mender's and Russo's motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the supporting Declaration of Timothy M. Russo, the supporting Request for Judicial Notice, the [Proposed] Order Granting Chip-Mender's and Russo's Motion to Dismiss or, in the Alternative, to Bifurcate and Stay Counterclaims, the materials on file in this action, and any argument submitted at the hearing on this motion.

DATED: October 17, 2005.

PERKINS COIE LLP

By /s/
Kenneth B. Wilson

Attorneys for Plaintiff CHIP-MENDER, INC.
and Counterclaim-Defendants CHIP-MENDER, INC. and
TIMOTHY M. RUSSO

Pursuant to Civil Local Rule 3-16, and this being the first appearance on behalf of counterclaim-defendant Timothy M. Russo (“Russo”), the undersigned certifies that the following persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

DATED: October 17, 2005.

By _____ /s/
Kenneth B. Wilson

Attorneys for Plaintiff CHIP-MENDER, INC.
and Counterclaim-Defendants CHIP-MENDER, INC. and
TIMOTHY M. RUSSO